In the Supreme Court of the United States

OCTOBER TERM, 1924

JOHN V. CAMPBELL, PLAINTIFF IN ERROR,
v.
THE UNITED STATES OF AMERICA } No. 73

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, TRANSFERRED FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

STATEMENT

This writ of error was taken to review a judgment of the District Court for the Southern District of Ohio. Originally carried to the Circuit Court of Appeals for the Sixth Circuit, that court transferred it to this Court pursuant to Section 238(a) of the Judicial Code.

The action was brought to secure compensation for property belonging to the plaintiff in error and appropriated by the United States for purposes connected with the prosecution of the war. The judgment awarded compensation for the value of the property actually taken, and for damages to the residue of the

estate resulting from the appropriation of the part actually taken, but declined to award damages by reason of the injury to the residue of the estate resulting from the uses, present and future, of various other tracts of land which the United States had acquired from persons other than the plaintiff. The refusal of the court to award such damages is the sole assignment of error.

The District Court treated the case as a so-called "Tucker Act" case. We think the court was right, and no complaint is made upon that score by either party. For that reason direct review should be had in this Court and not in the Circuit Court of Appeals, and while the order of the Circuit Court of Appeals assigns no special reason (R. 29), we think it plain that such was the view of that Court in transferring the cause to this Court.

THE FACTS

The case arose in this way: Prior to August 31, 1918, the United States had acquired possession of some 1,300 acres of land in the Little Miami Valley near the City of Cincinnati, comprising many parcels of land which it had acquired by purchase or condemnation proceedings from different owners. (R. 17.)

On that day officers of the United States, acting under authority of the Secretary of War, entered and took possession of 1.81 acres of land belonging to the plaintiff lying in the valley at the foot of the hill upon which plaintiff's residence was situated. This

was done without the consent of the owner and without compensating him. The lot so taken was used as a garden, was in a high state of cultivation, and was part and parcel of plaintiff's entire estate, which comprised 69.73 acres (R. 17), though separated from the remainder of his lands by a country road (R. 11.)

The purpose of the United States in acquiring this large tract of land was the construction of a nitrate plant, pursuant to the authority found in the Act of June 3, 1916 (c. 134, Sec. 124, 39 Stat. 166, 215). This act authorized the President to acquire by lease, purchase, condemnation, gift, grant, or devise necessary lands for that purpose. This land of the plaintiff was not acquired by any of these methods, and the act itself made no provision for a suit for just compensation by any person whose property was taken in any other way. Inasmuch, however, as the property was taken by due authority for a lawful purpose, the District Court held that an implied contract arose to pay the owner just compensation which was enforceable in accordance with section 24 (20) of the Judicial Code.

The United States proceeded with the construction of the nitrate works, erecting buildings, constructing railroads, a sewerage system, and such other things as are incident to a large industrial development. The plaintiff's land and the other adjoining land were enclosed with a fence.

After the Armistice the Government determined to abandon the project and to dispose of the properties

acquired. Part of the lands were returned to their former owners, part was sold, and the remaining 320 acres, including the 1.81 acres which had belonged to the plaintiff, are still held, but the court finds that the Government is definitely determined to sell.

The court found that the defendant's seizure and use of the 1.81 acres amounted to a taking of the fee thereof; that the value of the said fee was $750; and that plaintiff was entitled to recover from the defendant that sum. (R. 18.) The parties were in substantial agreement as to that element of damage. (R. 12.)

The court further found that the damages to the residue of plaintiff's estate resulting from the appropriation of the said 1.81 acres by reason of their severance, by reason of their loss as the convenient garden spot of the estate, by reason of the uses to which they have been put, particularly during the period of construction, and by reason of the uses to which the said 1.81 acres may in the future be put was the sum of $2,250, and that plaintiff was entitled to recover from the defendant that amount.

The court found that the present use of the other lands was not injurious to the plaintiff's estate except by reason of the fact that the view, which is a considerable element of its value, is less beautiful than it would have been had the agricultural surroundings continued unchanged (R. 17, 18); that the marring of the prospect is due principally to the presence of certain buildings and foundations of others that have

been removed; that these structures are, however, at quite a distance from plaintiff's residence and are not an obstruction to the view but only objects in the picture less pleasant than those which were formerly there; that the buildings are used as Government warehouses and stand on property which plaintiff did not own and are now used for storage quite independently of the land taken from plaintiff (R. 18).

The finding of the court to which the sole assignment of error is directed is as follows (R. 18–19):

> The court further finds that the amount of plaintiff's damages by reason of injury to the residue of his estate, by reason of the uses, present and future, of the various different tracts of land which defendant acquired by purchase or condemnation from persons other than plaintiff for the now abandoned nitrates project, and chiefly by reason of the probability that said tract improved as it has been by defendant by roads, railroads, sewers, fences, water, and lighting facilities, is soon to be offered for sale, and will probably be bought and used for industrial purposes, and that this probability has even at the present time a very depressing effect upon the value of plaintiff's estate considered from the standpoint of its best use, that of a fine country residence, is the sum of $5,000, but the court finds that plaintiff is not entitled to recover said sum, and said sum is therefore disallowed.

Whether the facts set forth in this last finding constitute elements of recoverable damage is the question now presented to the Court.

ARGUMENT

The District Court Awarded just compensation for the property taken

We agree with the proposition on page 11 of the brief of plaintiff in error that the taking of plaintiff's 1.81 acres created an implied contract on the part of the United States to compensate plaintiff in the same manner as he would have been compensated through proper proceedings in condemnation.

The measure of compensation in such cases is too well settled to be open to further discussion.

When part of a tract of land is taken for public use, the owner is entitled to recover first the value of the part taken, and second, the damage to the remainder of the tract resulting from the appropriation of a part of it to the uses for which it is taken. This rule is too well established to need citation of authority. In *Lewis on Eminent Domain*, 3d ed., vol. 2, sec. 686, it is stated that "upon this point there is entire unanimity of opinion," citing many cases. For these elements of damage the court below gave judgment.

But it is claimed that in addition plaintiff was entitled to damages for the injury to the residue of his estate by reason of the uses, present and future, of the various different tracts of land which defendant acquired from persons other than the plaintiff for the now abandoned project, and *chiefly by reason of the probability that these tracts will be offered for sale and will probably be bought and used for indus-*

trial purposes, and that this probability has a very depressing effect upon the value of plaintiff's estate as a fine country residence. In other words, that the defendant must pay to the plaintiff the sum of $5,000 for the privilege of selling land of which it is the lawful owner to whomsoever it will and for any purpose to which the purchasers shall see fit to use it.

On page 7 of the brief of plaintiff in error it is stated:

> It seems that the exact question here presented has never been decided either by this court or the Supreme Court of the State of Ohio.

To this statement it might be added that it is quite probable that no such claim was ever before presented to any court under any system of jurisprudence similar to ours. The United States must pay for what it took from the plaintiff, either of tangible property or of property rights recognized by the law and for the protection of which the plaintiff had a remedy. Of course, we are not dealing with the question of nuisance nor are we called upon to construe restrictive covenants in deeds. The bald proposition is that the United States should pay $5,000 to the plaintiff in error because it owns 320 acres of land which it has developed for factory purposes and which it proposes to sell, and that the probable use to which the land will be put, though lawful, is such as to impair the value of his property for residential purposes. The plaintiff has no right and never did have a right to prevent the United States from selling this land. He

is not trying to protect his land; he is trying to take away from the United States some of its property rights—that is, the right to sell its own property—by imposing upon the United States a penalty of $5,000 because it contemplates the exercise of that right.

The finding of the court is that this depreciation results "by reason of the uses, present and future, of the various different tracts of land defendant acquired" from persons other than the plaintiff and "chiefly by reason of the probability that said tract * * * is soon to be offered for sale and will probably be bought and used for industrial purposes." Another finding is that the *present use of these lands is not injurious to the plaintiff's estate except by reason of the fact that the view is less beautiful than it would have been had the agricultural surroundings continued unchanged.*

We are unable to find any authority which holds that the owner of property is entitled to recover because the owner of adjacent property has done something which, though lawful, has made it less beautiful than it was before, and that he proposes to sell it for manufacturing rather than agricultural purposes. The brief of the plaintiff in error, however, discusses at length the abstract proposition whether, in estimating damages to the residue of an estate where part is taken for public use, there must be allowed only such damages as flow from the use made of the land which is taken, or whether there must be included damages resulting from what is done by the condemnor upon other lands. The

weight of authority clearly is that the only damages recoverable are those due to the taking of the plaintiff's land and do not include that which is done upon other land, subject to a possible modification if the two are so blended in one entirety that separation becomes impossible.

Walker v. *Old Colony R. R. Co.*, 103 Mass. 10.
Lincoln v. *The Commonwealth*, 164 Mass. 368.
Adams v. *C. B. & N. R. R. Co.*, 39 Minn. 286.
Demueles v. *St. Paul & No. Pac. Ry. Co.*, 44 Minn. 436.
Keller v. *Miller*, 63 Colo. 304.
2 Lew. on Eminent Domain, 3d ed., sec. 750.
Horton v. *Colwyn Bay, etc., District Council*, L. R. (1908) 1 K. B. 327.
Richards v. *Washington Terminal R. R. Co.*, 233 U. S. 546.
Hatch v. *C. & R. R. R. Co.*, 18 Ohio St. 92.

In the case of *Lincoln* v. *Commonwealth*, 164 Mass. 368, the court, by Mr. Justice Holmes, after discussing cases in England and Massachusetts and the rule which permits recovery for depreciation of value arising from the proximity of a railroad and running of trains, so far as it is due to proximity secured by means of taking a part of petitioner's land and would not have resulted but for such taking, said (p. 377):

> * * * The rule laid down gives the damages, but only the damages due to the taking of the petitioner's land. It is true

> that the works might not have been constructed at all if they had not been put where they were, but this consideration is met by the fact that, if they had been constructed just outside his land, the petitioner would have suffered no wrong under the Constitution, or at common law if no statute had been passed, and would have had no remedy under the statute. At all events, the Massachusetts rule has been in force too long now to be questioned. * * *

The case of *Horton* v. *Colwyn Bay, etc., Council*, L. R. (1908) 1 K. B. 327, involved the question of damages for the construction of a sewage system pursuant to the Public Health Act. The sewers were in part constructed on land the property of claimant. The pumping station and the reservoir were constructed on land the property of other persons. The claimant was allowed damages for sewers constructed on his property, but not for the pumping station or anything else done on land not his property. The inference drawn by counsel for the plaintiff in error, on page 42 of his brief, that no land of the claimant was taken is erroneous.

In his opinion Lord Chief Justice Alverstone says (p. 332):

> There is no question as to his being entitled to the sum of £871 10s. in respect of land taken for the construction of certain sewers.

The case was tried before Bigham, J., and on appeal to the Court of Appeal his judgment was sustained. In his opinion the Lord Chief Justice

points out that the local authority had obtained no special statutory powers to acquire land compulsorily. Their power was that contained in a series of sections of the Public Health Act and by one section of that act, to quote the language of the Lord Chief Justice, "full compensation is to be paid for any damage sustained by any person by reason of the exercise of the powers of the act. Therefore the case is not one in which the work in respect of which the claim for compensation arises has been constructed under special statutory powers." He goes on to say that he does not think it very material, but "that it should not be lost sight of, having regard to some of the views that have been expressed in earlier cases as to the right of a claimant whose land is taken to exercise a veto, as it is said, upon the construction of the works." After considering numerous English cases, he quotes from the judgment of Bigham, J., as follows (p. 339):

> I think it is clear that the exercise of the statutory powers referred to and contemplated by the learned judges in the *Tilbury Case* (1) consists of something done on the land taken from the claimant by the public body, or on land held by him. Such an exercise of the statutory powers alone concerns him. The statutory powers exercised elsewhere, though they may depreciate the value of his property, can not in my opinion be relied upon for the purpose of increasing the compensation recoverable.

And says that in his opinion "that is a perfectly accurate statement of the result of the authorities as they now stand."

Lord Justice Buckley, in his concurring opinion, says (p. 340), "but no case has been cited, and none, I think, exists in which the doctrine has been applied to damage occasioned by works erected upon land not taken from the claimant."

To be sure, as pointed out by this court in *Richards* v. *Washington Terminal R. R. Co.*, 233 U. S. 546, neither the English courts nor Parliament is bound by any constitutional provision like ours against taking private property for public use without just compensation. But even so, reported cases show not only the disposition of Parliament to provide by act full protection to owners of property taken, but a disposition on the part of the English courts to construe those provisions so as to give property owners adequate compensation. It is interesting to note that the result now reached by the English Courts is substantially in accord with the spirit of our Fifth Amendment. See 33 *Howard Law Review* 713, 714, commenting upon *Attorney General* v. *Keyser's Hotel* (1920) A. C. 508. Some of the Acts of Parliament would seem to be much broader than the Fifth Amendment. For instance, the Scotch Railroad Clauses Act of 1845 provides that the railroads should make the owners and occupiers and all other parties interested in any lands taken "or injuriously affected by the construction thereof, full compensation for the value of the land so taken and

for all damage sustained by such owners." In construing this section the House of Lords in *Caledonian Ry. Co.* v. *Walker's Trustee* (1882) 7 App. Cases, 529, held that in order to found a claim for compensation under that section some special or peculiar damage must be done to the lands by reason of the construction of the works which diminished the value of the lands, which damage would have been the subject of an action at law before the statute.

This principle was recognized by this court in *Richards* v. *Washington Terminal R. R. Co.*, 233 U. S. 546, which was an action for damages for a nuisance. While this Court held that the plaintiff, whose property was situated near the entrance to the tunnel in this city, though not abutting directly upon the tracks, was entitled to damages for injuries from great quantities of smoke and gas coming from the tunnel by a ventilating contrivance, nevertheless it held that he was not entitled to any damages for the ordinary and inevitable annoyance and damage incident to the operation of the railroad. The damage allowed in that case was regarded as special, peculiar, and perhaps unnecessary. If not preventable, then the plaintiff's property was to be regarded as "necessary for the purposes contemplated" by the statute, and so might be acquired by purchase or condemnation. If the damage was readily preventable, then the statute furnished no excuse. In other words, it was a private nuisance.

We have no such situation presented here.

The protection afforded by the Constitution is for those whose property is "taken," not "taken or damaged," as in some of the State constitutions. 233 U. S. 554.

Mr. Justice Pitney in the *Richards case* reviews at some length the English and American cases on this subject and concludes that in the case of railroads (p. 554)—

> Any diminution of the value of property not directly invaded nor peculiarly affected, but sharing in the common burden of incidental damages arising from the legalized nuisance, is held not to be a "taking" within the constitutional provision.

Though, as held by Judge Peck in the court below, this is not a case of local law (see *Kanakanui* v. *United States*, 244 Fed. 925) in which the decisions of the Ohio courts are controlling, nevertheless he shows clearly that there is nothing in the decisions of the Supreme Court of that State contrary to position taken by the Government (p. 14).

The case is not analogous to the *Elevated Railroad Cases* in New York City, where it was held that the construction, maintenance, and operation of an elevated railroad on a public street, even though by legislative and municipal authority, deprived the abutting owners of certain easements defined as easements of light, air, and access, which were in the nature of property protected by the Constitution. Indeed the case is quite different from the railroad cases in general, for the construction and operation

of a steam railroad anywhere in this country without legislative authority would probably be regarded as actionable nuisance for which neighboring property owners injuriously affected would be entitled to redress. Such is not the case when the owner of unrestricted land builds a factory on it, much less the case when he merely contemplates selling it to some one else who may build a factory on it.

But the abstract question whether a property owner, some of whose property is taken, is entitled to damages for the rest of his property based upon acts not done or contemplated upon property taken from him, but upon other property which he does not and never did own, while interesting, does not, we think, really arise in this case. The findings of the trial court show clearly that the depreciation which the plaintiff in error seeks to recover as damages is too remote and speculative to be considered. It does not amount to a "taking" of plaintiff's property, and this court has decided many times that recovery can not be had against the United States for anything short of a taking of property.

See *Smith* v. *Corporation of Washington*, 20 Howard, 135, alterations in the grade of streets; *Gibson* v. *United States*, 166 U. S. 269, damages resulting from improvement of a navigable river; *Meyer* v. *City of Richmond*, 172 U. S. 82, obstruction of a street by a railroad authorized by the city of Richmond; *Scranton* v. *Wheeler*, 179 U. S. 141, 153, 162, construction of a pier by the United States; *Bedford* v. *United States*, 192 U. S. 217, 224, 225, flooding of land as a result of

revetments erected by the Government along the banks of the Mississippi River; *Union Bridge* v. *United States*, 204 U. S. 364, 397, damages for the alteration of a bridge over a navigable river ordered by the Secretary of War; *Peabody* v. *United States*, 231 U. S. 530, 538, 539, the location of a battery within the vicinity of the owner's land and within the range of the fort; *Portsmouth Harbor Land Company* v. *United States*, 250 U. S. 1, damages resulting from gunfire; *Bothwell* v. *United States*, 254 U. S. 231, forced sale of cattle and destruction of business on account of the construction by the Government of a dam which flooded the owner's land.

CONCLUSION

The judgment should be affirmed.

JAMES M. BECK,
Solicitor General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

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